

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**REGINA L. DOUGHERTY**  
Claimant

VS.

**OCCK, INC.**  
Respondent

AND

**LIBERTY MUTUAL INS. CO. and  
KANSAS EMPLOYERS WORKERS  
COMPENSATION FUND**  
Insurance Carriers

Docket No. 1,020,210

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier, Liberty Mutual Insurance Co. (Liberty Mutual), requested review of the June 5, 2007, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on September 21, 2007. George H. Pearson, III, of Topeka, Kansas, appeared for claimant. Michael D. Streit, of Wichita, Kansas, appeared for respondent and its insurance carrier, Liberty Mutual. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier, Kansas Employers Workers' Compensation Fund (Kansas Employers).

The Administrative Law Judge (ALJ) concluded that claimant suffered personal injury by accident arising out of and in the course of her employment and that she suffered a 10 percent permanent partial impairment of function to each upper extremity. The ALJ stated that the parties stipulated to a date of accident of September 22, 2004, and that Liberty Mutual did not request to be relieved of its stipulation. The ALJ further found that the medical evidence supported the parties' stipulation that claimant's injury occurred as of September 22, 2004. Accordingly, the ALJ found that respondent/Liberty Mutual were responsible for this claim.

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

Respondent/Liberty Mutual contend that claimant did not suffer injuries which arose out of and in the course of her employment but, rather, her injuries were caused by her personal conditions and activities. If the Board finds claimant suffered work-related injuries, respondent/Liberty Mutual contend that claimant suffered two scheduled injuries and that only the injury to her right upper extremity occurred during the coverage period of Liberty Mutual. They contend the injury to the left upper extremity occurred during the coverage period of Kansas Employers. Respondent/Liberty Mutual further deny that they stipulated to September 22, 2004, being the date of claimant's accident at the regular hearing. In the event the Board finds that respondent/Liberty Mutual stipulated to a date of accident of September 22, 2004, they request the Board exercise its discretion and release them from the stipulation. During oral argument to the Board, respondent/Liberty Mutual also argued that if this claim is found to be compensable, then the Board should reduce claimant's percentage of permanent impairment by giving equal weight to each of the physician's opinions.

Claimant argues that the ALJ's Award should be affirmed in all respects. Claimant asserts it does not matter who pays the Award but indicates that respondent/Liberty Mutual stipulated to a date of accident within Liberty Mutual's coverage period. Claimant objects to respondent/Liberty Mutual's request to be relieved of their stipulation and objects to this matter being remanded for further evidence concerning the date of claimant's accident.

Respondent/Kansas Employers filed their brief out of time in this appeal, and therefore, it was not considered. During oral argument to the Board, respondent/Kansas Employers argued that the ALJ's Award should be affirmed. In the alternative, should the Board either find respondent/Liberty Mutual did not stipulate to a September 22, 2004, date of accident or that respondent/Liberty Mutual should be relieved from their stipulation, then this matter should be remanded to the ALJ with instructions that the record be reopened.

The issues for the Board's review are:

- (1) Did claimant meet with personal injury arising out of and in the course of her employment with respondent?
- (2) What is the nature and extent of claimant's disability?
- (3) Did respondent/Liberty Mutual stipulate to a date of accident of September 22, 2004? If so, should the Board release them from that stipulation?

(4) If the Board releases respondent/Liberty Mutual from their stipulation, should this matter be remanded to the ALJ?

(5) If the Board releases respondent/Liberty Mutual from their stipulation, what are the dates of claimant's accidents and which of respondent's insurance carriers is liable for the award?

#### FINDINGS OF FACT

Respondent is a group home for mentally and physically disabled people, and claimant was hired as a residential trainer in July 2001. She takes care of five residents. Her duties consist of teaching them to take care of their money, bathing them, cooking for them, cleaning, and taking care of their general everyday needs.

In May 2004, claimant began to notice sharp pains and tingling in her hands and fingers when she was lifting residents out of wheelchairs. She also noticed symptoms when she was cooking. She felt pain when she worked with knives and when stirring pots. The pain was in both hands and they would feel numb. She reported the problem to Jim Rubinstein, respondent's human resources person, in July 2004. Mr. Rubinstein sent her to Michael Guhr, a physician's assistant, on July 5, 2004. Mr. Guhr put her on Ibuprofen, gave her cock-up splints for her hands, and ordered an EMG.

The EMG was performed on August 2, 2004, and it revealed that claimant suffered from moderately severe bilateral carpal tunnel syndrome. Mr. Guhr then referred her to Dr. Michael Johnson, who performed a right carpal tunnel release on September 22, 2004. Claimant was scheduled to have carpal tunnel release surgery on her left in November 2004. That surgery was delayed until the parties had a preliminary hearing, after which claimant was sent to Dr. Sergio Delgado for an independent medical examination (IME) ordered by the ALJ. Dr. Delgado noted that claimant had left carpal tunnel syndrome and some residuals of right carpal tunnel syndrome. He believed that claimant's complaints were related to repetitive use of her upper extremities at work. He opined that claimant should have left carpal tunnel release surgery. After seeing Dr. Delgado, the surgery on claimant's left wrist was authorized and was performed in July 2005.

Claimant returned to full duty at respondent. She continues to have pain in her left hand, as well as in her middle finger and thumb on the left. The problems on her left are constant. She has lost grip strength in her right hand. If she presses wrong, such as when opening jars or pushing a wheelchair, she gets a sharp pain that goes through the lower part of her right arm. Vacuuming gives her trouble, depending on how she holds the handle.

Dr. Michael Johnson, a board certified orthopedic surgeon, first saw claimant on August 10, 2004, for her problems with bilateral carpal tunnel syndrome. By the time Dr. Johnson saw claimant, she had already been through conservative treatment, so he did

not institute any more and was of the opinion that she needed carpal tunnel release surgery on both wrists. He performed a right carpal tunnel release on claimant on September 22, 2004. He released her to full duty on October 19, 2004. He performed a left carpal tunnel release on July 6, 2005.

Dr. Johnson rated claimant as having a 5 percent left upper extremity impairment, which converted to a 3 percent whole person impairment, using the 5th edition of the *AMA Guides*.<sup>1</sup> Upon reviewing the 4th edition of the *AMA Guides*,<sup>2</sup> Dr. Johnson opined that claimant would still have a 5 percent left upper extremity impairment. He did not give claimant a rating for her right carpal tunnel syndrome and release. He stated that after surgery, claimant did not have any numbness, tingling or sensory losses on the right, and had only very minimal grip strength loss. He opined that claimant had a 0 percent upper extremity impairment for her right upper extremity.

Dr. Chris Fevurly is board certified in occupational medicine and internal medicine and as an independent medical examiner. He examined claimant on December 20, 2004, at the request of respondent and Liberty Mutual. He reviewed her medical records and took a history from her. Dr. Fevurly noted that Mr. Guhr's medical record of July 5, 2004, stated that claimant had Type II diabetes that was diet controlled. Claimant's weight is in the over-300-pound range, and Dr. Fevurly said that she told him she had a history of diabetes, for which she had previously taken medication. However, claimant testified at the regular hearing that she does not have diabetes.

Dr. Fevurly said that there are many contributing factors to the development of carpal tunnel syndrome, two of which are obesity and diabetes. Claimant's job description was not strong in regard to causation between those hand activities and the development of carpal tunnel syndrome. Dr. Fevurly believed, therefore, that the major causes of claimant's carpal tunnel syndrome were her obesity and diabetes. The hand activity performed on the job, however, would have been an aggravating activity. Dr. Fevurly did not rate claimant's impairment.

Dr. Pedro Murati is a board certified independent medical examiner. He is also board certified in electrodiagnostic medicine and rehabilitation and physical medicine. He examined claimant on November 22, 2005, at the request of her attorney. Claimant told Dr. Murati that the problems with her hands came about from the work she was performing for respondent. She told Dr. Murati that she was not diabetic. Dr. Murati believes that even if she was diabetic, the repetitive work she described doing would aggravate or accelerate bilateral median neuropathy. Diabetes could have been a secondary cause of

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.).

<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

some neuropathy. Dr. Murati believed that it was claimant's activities at work that resulted in the carpal tunnel syndrome more than any potential diabetes condition she might have.

Using the AMA *Guides*, Dr. Murati rated claimant as having a 10 percent upper extremity impairment on both her right and left. Each rating would convert to 6 percent, and combine for a 12 percent whole person impairment.

### PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>3</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>4</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>5</sup>

The ALJ determined that the stipulated September 22, 2004, date of accident was consistent with the long line of cases establishing a date of accident for a repetitive use injury, citing *Treaster*,<sup>6</sup> *Lott-Edwards*,<sup>7</sup> and *Berry*.<sup>8</sup> However, effective July 1, 2005, the

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<sup>3</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>4</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

<sup>5</sup> *Id.* at 278.

<sup>6</sup> *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

<sup>7</sup> *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

<sup>8</sup> *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

Kansas Legislature altered the case law by creating a statutory definition of date of accident when the injury is due to a series of accidents.

K.S.A. 2006 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2006 Supp. 523(d) states:

Not less than 10 days prior to the first full hearing before an administrative law judge, the administrative law judge shall conduct a prehearing settlement conference for the purpose of obtaining stipulations from the parties, determining the issues and exploring the possibility that the parties may resolve those issues and reach a settlement prior to the first full hearing.

K.A.R. 51-3-8 states in part:

The parties shall be prepared at the first hearing to agree on the claimant's average weekly wage except when the weekly wage is to be made an issue in the case. (a) Before the first hearing takes place, the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case. The following stipulations shall be used by the parties in every case:

#### QUESTIONS TO CLAIMANT

1. In what county is it claimed that claimant met with personal injury by

accident? (If in a different county from that in which the hearing is held, then the parties shall stipulate that they consent to the conduct of the hearing in the county in which it is being held.)

2. Upon what date is it claimed that claimant met with personal injury by accident?

#### QUESTIONS TO RESPONDENT

3. Does respondent admit that claimant met with personal injury by accident on the date alleged?

4. Does respondent admit that claimant's alleged accidental injury "arose out of and in the course" of claimant's employment?

5. Does respondent admit notice?

6. Does respondent admit that the relationship of employer and employee existed?

7. Does respondent admit that the parties are covered by the Kansas workers compensation act?

8. Does respondent admit that claim was made?

9. Did the respondent have an insurance carrier on the date of the alleged accident? What is the name of the insurance company? Was the respondent self-insured?

#### QUESTIONS TO BOTH PARTIES

10. What was the average weekly wage?

11. Has any compensation been paid?

12. Has any medical or hospital treatment been furnished? Is claimant making claim for any future medical treatment or physical restoration?

13. Has claimant incurred any medical or hospital expense for which reimbursement is claimed?

14. What was the nature and extent of the disability suffered as a result of the alleged accident?

15. What medical and hospital expenses does the claimant have?

16. What are the additional dates of temporary total disability, if any are claimed?

17. Is there a need for the claimant to be referred for a vocational rehabilitation evaluation?

18. Is the workers compensation fund to be impleaded as an additional party?

19. What witnesses will each party have testify at hearing or by deposition in the trial of the case?

20. Have the parties agreed upon a functional impairment rating?

The same stipulations shall be used in occupational disease cases with the exception that questions regarding "accidental injury" shall be changed to discover facts concerning "disability from occupational disease" or "disablement."

(b) An informal pre-trial conference shall be held in each contested case before testimony is taken in a case. At these conferences the administrative law judge shall determine from the parties what issues have not been agreed upon. If the issues cannot be resolved, the stipulations and issues shall be made a part of

the record.

(c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

(d) All parties shall be given reasonable opportunity to be heard. The testimony taken at the hearing shall be reported and transcribed. That testimony, together with documentary evidence introduced, shall be filed with the division of workers compensation, where the evidence shall become a permanent record. Any award or order made by the administrative law judge shall be set forth in writing, with copies mailed to the parties.

(e) Permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance.

In *Arrowhead Constr. Co.*,<sup>9</sup> the Kansas Supreme Court stated: "It is well established that a court is not bound by erroneous stipulations or admissions with regard to questions of law."

In *Morrison*,<sup>10</sup> the Kansas Supreme Court stated:

Courts are warranted in relieving parties from stipulations improvidently or mistakenly made, and considerable discretion is vested in a trial court as to whether the relief shall be granted, depending on the facts and circumstances of each case.

The Kansas Court of Appeals, in *Wentz Equip. Co.*,<sup>11</sup> stated:

When a stipulation of facts is agreed to by the parties, a trial court can render only "such judgment as those facts warranted." *Baker v. City of Leoti*, 179 Kan. 122, 126, 292 P.2d 720 (1956). "Evidence of facts not within the issues agreed on is not admissible." 83 C.J.S., Stipulations § 22. "Valid stipulations as to evidence are binding on the court, which is bound to enforce them; and *the court cannot go*

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<sup>9</sup> *Arrowhead Constr. Co. v. Essex Corp.*, 233 Kan. 241, 245, 662 P.2d 1195 (1983) (citing *State, ex rel., v. Masterson*, 221 Kan. 540, 551, 561 P.2d 796 [1977]; *Urban Renewal Agency v. Reed*, 211 Kan. 705, 712, 508 P.2d 1227 [1973]).

<sup>10</sup> *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 2, 512 P.2d 438 (1973). See also *Hardesty v. Coastal Mart, Inc.*, 259 Kan. 645, 915 P.2d 41 (1996).

<sup>11</sup> *Wentz Equip. Co. v. Missouri Pacific R.R. Co.*, 9 Kan. App. 2d 141, 142, 673 P.2d 1193 (1983), rev. denied 235 Kan. 1042 (1984).



*beyond the terms of the stipulation.” Stipulations § 23. Emphasis added. “[O]rdinarily, as we have said more than once, courts are bound by stipulations of the litigants.” In re Estate of Maguire, 204 Kan. 686, 691, 466 P.2d 358, modified on other grounds 206 Kan. 1, 476 P.2d 618 (1970). The only exceptions to this rule that come to our minds are (1) stipulations as to controlling law, 204 Kan. at 691, and (2) stipulations as to jurisdiction.*

### ANALYSIS

For the reasons stated therein, the Board agrees with and adopts the ALJ’s findings and conclusions regarding claimant’s personal injury by accident arising out of and in the course of her employment with respondent and the nature and extent of claimant’s resulting permanent impairment of function. As for the date of injury, the following colloquy was set out in the transcript of the regular hearing:

THE COURT: Let’s call for record purposes Regina L. Dougherty versus OCKK, Incorporated and two insurance carriers, Liberty Mutual Insurance Company and Kansas Employers Workers Compensation Fund. This is Docket No. 1,020,210.

This case comes on for regular hearing today. Miss Dougherty appears in person and with her attorney, George Pearson. Respondent and its insurance carrier, Liberty Mutual, appeal through one of their attorneys, Ryan Weltz. The respondent and a successor insurance carrier, the Kansas Employers Workers’ Compensation Fund, appear through their attorney, Ronald Laskowski.

This is a Saline County claim. My notes of the prehearing settlement conference held on October 6, 2006, suggests that the parties agreed on a date of accident for this claimed series of September 22nd, 2004, is that correct?

MR. PEARSON: That’s correct, as far as I’m concerned, Your Honor.

MR. WELTZ: Yes, Your Honor.

MR. LASKOWSKI: That’s correct.<sup>12</sup>

The ALJ went on to list the issues as:

THE COURT: . . . So our issues are as they were at the time of prehearing settlement conference: Personal injury by accident, arising out of and in the course of employment, and notice, and this is a nature and extent, functional only claim; is that correct?

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<sup>12</sup> R.H. Trans. at 4.

MR. PEARSON: Correct, Your Honor.

THE COURT: All right. Are there any other issues or preliminary matters we need to address before taking claimant's testimony today?

MR. PEARSON: None.

MR. LASKOWSKI: No.

MR. WELTZ: No, Your Honor.<sup>13</sup>

This regular hearing was conducted on February 13, 2007. At the conclusion of the hearing, Judge Moore set terminal dates of March 16, 2007, for claimant and April 16, 2007, for respondent and its insurance carriers. On May 1, 2007, Judge Moore approved an agreed order extending claimant's terminal date to March 30, 2007, and the terminal dates for respondent and its insurance carriers to April 30, 2007. The last evidentiary deposition, that being of Dr. Johnson, was taken by respondent/Liberty Mutual on April 19, 2007. At no time during the trial of this case did respondent/Liberty Mutual or any other party make a request to the court to be relieved from any stipulation. Nevertheless, respondent/Liberty Mutual appear to have been confused about the stipulations because they listed "date of accident" as an issue in their submission brief to the ALJ. The submittal brief of respondent/Kansas Employers, however, specifically stated: "There is no issue presented in this case regarding the date of accident. At Regular Hearing held before the Honorable Bruce E. Moore on February 13, 2007, the parties stipulated to a date of accident of September 22, 2004."<sup>14</sup> Claimant's submission letter's itemization of stipulations includes that "[c]laimant met with personal injury by accident in the course of her employment on September 22, 2004."<sup>15</sup> The only issues listed by claimant are nature and extent of claimant's disability and whether claimant is entitled to future medical expenses. Respondent/Liberty Mutual neither sought clarification of the stipulations and issues nor sought relief from their stipulation to the date of accident before Judge Moore issued his Award determination on June 5, 2007.

The record establishes that the parties stipulated to a date of accident of September 22, 2004, and the case was tried on that basis. Respondent/Liberty Mutual did not ask the trial court for relief from their stipulation. The Board will not do so on appeal.

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<sup>13</sup> *Id.* at 8-9.

<sup>14</sup> Submission letter of respondent/Kansas Employers (filed May 14, 2007) at 2.

<sup>15</sup> Submission letter of claimant (filed May 16, 2007) at 1.

**CONCLUSION**

(1) Claimant met with personal injury arising out of and in the course of her employment with respondent.

(2) Claimant suffered a 10 percent permanent partial impairment of function to each upper extremity at the level of the forearm.

(3) The parties stipulated that claimant's date of accident was September 22, 2004. The Board will not release respondent/Liberty Mutual from that stipulation.

Based upon the above findings and conclusions, the remaining issues are moot.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated June 5, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, III, Attorney for Claimant  
Michael D. Streit, Attorney for Respondent and its Insurance Carrier Liberty Mutual  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier Kansas  
Employers Workers Compensation Fund  
Bruce E. Moore, Administrative Law Judge